A

TING KHAI SIN & ORS v. PP

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
ROHANA YUSUF JCA
HAMID SULTAN ABU BACKER JCA

B

[CRIMINAL APPEALS NO: Q-05-242-09-2012; Q-05-243-09-2012; Q-05-244-09-2012 & Q-05-290-11-2012]
3 SEPTEMBER 2014

C

CRIMINAL LAW: *Kidnapping Act 1961 – Section 3(1) – Appeal against conviction and sentence – Whether ransom demanded for release of victim – Whether ransom sum stated in grounds of decision differed from sum stated in charge – Whether a miscarriage of justice – Conduct and motive – Whether demand for ransom had nexus to victim's release – Whether ingredients of offence established – Whether there was common intention to commit crime – Evidence Act 1950,*

D

s. 8

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Appellants charged for kidnapping victim – Whether ransom demanded for release of victim – Whether trial judge did not appreciate and understand specific meaning of ransom – Whether ingredients of offence established – Whether appellants should*

E

have been convicted for a lesser charge – Whether appellate court affirmed decision of trial court – Kidnapping Act 1961, ss. 2 & 3(1)

WORDS & PHRASES: *'ransom' – Kidnapping Act 1961, s. 2 – Meaning of – Whether exact sum demanded should be stated in charge – Whether demand for ransom had nexus to victim's release – Whether ingredients of offence under s. 3*

F

established

The appellants were charged and tried for an offence under s. 3(1) of the Kidnapping Act 1961 for kidnapping one Madam Wong Tee Yong ('the victim') with the common intention to hold her for a ransom of RM250,000.

G

The facts revealed, *inter alia*, that while the victim was under the appellants' custody, her credit card was used to buy gold and money was withdrawn from various bank accounts using her ATM card. Further, it was submitted that the appellants had threatened to rape the victim's daughter and kill her son if the victim did not follow their instructions. The High Court Judge found that the appellants had abducted or wrongfully confined or wrongfully

H

restrained the victim and sentenced them to life imprisonment. Hence, these appeals. Based on the appellants' respective submissions, it was asserted, *inter alia*, that (i) the original charge and the amended charge stated the ransom sum as RM250,000 but the trial judge specified the ransom sum as RM53,400 in the grounds of decision; (ii) there was no evidence to show that

I

the appellants demanded the ransom sum of RM53,400 from the victim; (iii) there was no evidence to show that the money allegedly demanded was as consideration for the release of the victim; (iv) the trial judge did not

appreciate and understand the specific meaning of 'ransom' as defined under s. 2 of the Act; (v) the prosecution failed to establish the essential ingredients of the offence under s. 3(1) of the Act read together with s. 34 of the Penal Code; (vi) there was a failure to convict the appellants for a lesser charge of extortion; and (vii) there was no common intention in that the first appellant was not privy to the alleged abduction and not involved in any pre-arranged plan. It was submitted that the first appellant was a victim of the crime and she was not a party to the concerted plan in the alleged kidnapping of the victim.

Held (dismissing appeals; affirming decision of the High Court)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) Section 2 of the Act defines ransom as any money, price or consideration paid or demanded for the release of a person abducted or wrongfully confined or wrongfully restrained. The law does not require the exact sum asked or paid to be stated in the charge. The exact sum was not an element of the offence. Once a person is abducted and ransom is asked for the release, a charge under s. 3 of the Act is attracted. On the facts, there were ample evidences to show that s. 3 was applicable. The appellate court is not to intervene when there was sufficient evidence to justify the charge pursuant to s. 60 of the Courts of Judicature Act 1964. (paras 12 & 13)

(2) Conduct and motive under s. 8 of the Evidence Act 1950 will clearly bring nexus to the demand, consideration and the release of the victim. The conduct of the appellants on this issue was inextricably interwoven to anchor the charge as well as culpability. This was not a case where the ransom had no nexus to the victim's release. If not for the ransom, the victim would not have been released. Further, the money was demanded so that the victim's children were not harmed. (paras 14 & 15)

(3) There was no duty and obligation for the trial judge to consider a lesser offence when the evidence was sufficient to attract s. 3 of the Act. This was not a case where the prosecution had offered an alternative charge. The obligation to consider a lesser charge would only be applicable if the prosecution had not established its case beyond reasonable doubts as per the charge but the learned trial judge takes the view that there was sufficient evidence to attract a lesser charge. The law does not permit the appellants to demand a lesser charge when the prosecution had established its case beyond reasonable doubts as per the charge. (para 17)

(4) A pre-arranged plan was not a necessity element for common intention to apply. What is important in this case is that the first appellant had nexus and participated in the conduct of the other appellants during the relevant period of the crime to attract criminal liability. Further, the evidence did not exonerate the first appellant from the crime. (para 19)

A **(5)** It is in the hands of the triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. On the facts, there were sufficient materials to support the charge and the view taken by the trial court on the relevant issues was reasonable. As such, there was no merit in the appeals.
B (paras 23 & 24)

Case(s) referred to:
Chin Kek Shen v. PP [2013] 7 CLJ 435 CA ***(refd)***
PP v. Ini Abong & Ors [2009] 1 CLJ 526 HC ***(refd)***
PP v. Mohd Aszzid Abdullah [2008] 1 MLJ 281 ***(refd)***
C *Ravindran Ramasamy v. PP [2013] 8 CLJ 834 CA* ***(refd)***
Tong Kam Yew & Anor v. PP [2013] 4 CLJ 470 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Evidence Act 1950, s. 8
D Kidnapping Act 1961, ss. 2, 3

(Criminal Appeal No: Q-05-242-09-2012)
For the appellant – Wee Wui Kiat; M/s Battenberg & Talma Advocs
For the respondent – Lailawati Ali; DPP

(Criminal Appeal No: Q-05-243-09-2012)
E *For the appellant – David Kuok Han Peh; M/s Wong, Orlando Chuah & Kuok*
For the respondent – Lailawati Ali; DPP

(Criminal Appeal No: Q-05-244-09-2012)
For the appellant – Yap Hoi Liong; M/s Yap Hoi Liong & Co
For the respondent – Lailawati Ali; DPP

F *(Criminal Appeal No: Q-05-290-11-2012)*
For the appellant – Anthony Tai; M/s Anthony Tai Advocs
For the respondent – Lailawati Ali; DPP

[Editor's note: For the High Court judgment, please see PP v. Ting Khai Sin & Ors [2012] 1 LNS 1373.]

G
Reported by Kumitha Abd Majid

JUDGMENT

Hamid Sultan Abu Backer JCA:

H
[1] The appellants' appeals against conviction and sentence of life imprisonment for kidnapping came up for hearing on 16 April 2014 and upon hearing we dismissed the appeals. My learned brother Mohamad Ariff bin Mohd Yusof JCA and my learned sister Rohana binti Yusuf JCA have read the draft judgment and approved the same. This is our judgment.

I

Preliminaries

[2] All the appellants' counsel conceded during the hearing of these appeals that there was extortion and not kidnapping. This part was eloquently taken up in the submission of the first appellant and reads as follows:

> (d) On the contrary, the learned judge in her grounds of decision under the heading "Was there Ransom?" states clearly that "the evidence shows that the accused persons did not call any relatives or friends of Madam Wong demanding for money for her release." The learned judge further states that "Instead, upon request by Madam Wong to let her call her relatives to fetch her son and daughter who were in school, the 3rd accused i.e. the driver, threatened to kill her son and rape her daughter if Madam Wong did not do what they said i.e. to telephone her relatives and friends to deposit money into her or others bank accounts. This caused Madam Wong to plead with them tearfully not to hurt her children and that she would do whatever they wanted." All these clearly show that the complainant was put in fear of injury to her children when money was demanded from her, if any, and at most it constituted the offence of extortion and not kidnapping. The charge of kidnapping against the 1st appellant therefore cannot sustain.

[3] The amended charge against the appellants reads as follows:

> Bahawa kamu bersama-sama pada 17.07.2010 jam lebih kurang 9.30 pagi bertempat di rumah No. 5A, Jalan Bruang, dalam Daerah Sibu di dalam Negeri Sarawak, bagi mencapai matlamat bersama, dengan maksud menahan Wong Tee Yong (P) (KPT: 630607-13-5144) untuk wang tebusan berjumlah RM250,000.00 (Ringgit Malaysia: Dua Ratus Lima Puluh Ribu). Maka dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 3(1) Akta Culik 1961 dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[4] The first appellant's petition of appeal *inter alia* reads as follows:

> 2.1. The 1st appellant has been wrongly convicted on a charge which was never preferred against her.
>
> 3.1. The learned Judge was wrong to have ruled that there was a *prima facie* case when the totality of the evidence at the end of the prosecution's case did not establish the essential ingredient of 'ransom' under section 3(1) of the Kidnapping Act 1961.
>
> 4.1. In determining whether an offence of kidnapping or any other lesser offence had been committed, the learned Judge had made the following erroneous to show her disagreement that a lesser offence had been committed as contented by the 1st appellant.
>
> 5.1. The learned Judge was wrong to have found that there was a common intention between the 1st appellant and all the accused persons to commit the offence charged when the circumstances of

A the case do not show that the 1st appellant was privy to the alleged abduction or that she was involved in any pre-arranged plan and further that she did not act in concert pursuant to the pre-arrange plan.

6.1. There is no evidence of the ingredient of 'ransom' as defined in
B section 2 of the Kidnapping Act 1961. The prosecution has failed to establish beyond reasonable doubt the most essential ingredient of ransom for the offence of kidnapping under section 3(1) of the Kidnapping Act 1961. The conviction is therefore unsafe.

[5] The second appellant's petition of appeal *inter alia* reads as follows:

C 1. The learned High Court Judge was wrong to have called for the defence at the end of the prosecution's case when the prosecution's evidence did not establish a *prima facie* case.

2. The learned High Court Judge was wrong to have called for the defence when the prosecution had failed to establish the ingredient
D of ransom an essential ingredients of section 3(1) of the Kidnapping Act 1961.

3. The learned High Court Judge did not appreciate and understand the specific meaning of ransom and had misdirected herself on the law and principle relating to section 3(1) of the Kidnapping Act 1961
E and even overlooked, ignored the definition of ransom as laid down in the High Court decision of *PP v. Ini Abong & ors* [2009] 1 CLJ 5206 in respect of which there was no appeal.

4. The learned High Court Judge failed to appreciate and apply the trite law principle that there is no *prima facie* case if any one of the essential ingredients is not establish as laid down in the case of *PP*
F *v. Baldev Singh* [1985] 2 MLJ 453.

5. The learned High Court Judge had failed to take into account the evidence of PW1 Wong Tee Yong.

6. The learned High Court Judge had also failed to take into account the evidence of PW3.
G

7. The learned High Court Judge failed to take into account the evidence of IO ASP Yeo Chin Shyan which show that PW1 had informed him.

8. The learned High Court Judge had failed to re-evaluate and re-
H assess the prosecution case under section 182A.

9. The learned High Court Judge was wrong in finding when she said that she disbelieved the 2nd accused and that the allegation of the 2nd accused was refuted by the behaviour of the 1st accused.

10. The learned High Court Judge was wrong to have found that there
I was a common intention between all the accused persons to commit the offence charged when the circumstances of the case do not show that the appellant (Lu King Wen) was privy to the alleged

abduction and that he was involved in any pre-arranged plan and further that he did not act in concert pursuant to the pre-arranged plan.

11. The verdict is unreasonable and cannot be supported having regard to the evidence adduced.

[6] The third appellant's petition of appeal *inter alia* reads as follows:

1. Yang Arif had erred in law and in fact when she decided that the appellant had intent to hold Wong Tee Yong for ransom under section 3(1) of Kidnapping Act 1961 and thereby failing to consider the fact that there was no ransom at all.

2. Yang Arif had erred in law and in fact when she decided that the appellant had abducted or wrongfully confined or wrongfully restrained Wong Tee Yong under section 3(1) of Kidnapping Act 1961 without considering the fact that evidence discloses that it was one Sia How Tung who had abducted, confined or restrained Wong Tee Yong.

3. Yang Arif had erred in law and in fact when she decided that the appellant had abducted or wrongfully confined or wrongfully restrained Wong Tee Yong with intent to hold her for a ransom of RM250,000.00 under section 3(1) of the Kidnapping Act 1961 without considering the fact that there was no ransom specified of the sum of RM250,000.00.

4. Yang Arif had erred in law and in fact when she decided that the appellant had the common intention in abducting or wrongfully confining or wrongfully restraining Wong Tee Yong with intent to hold her for a ransom of RM250,000.00 under section 3(1) of Kidnapping Act 1961 and thereby failing to consider the fact that evidence shows one Sia How Tung who had abducted or restrained Wong Tee Yong.

5. Yang Arif had erred in law and in fact when she failed to consider Wong Tee Yong's mistaken identification of another suspect as the appellant during the identification parades.

[7] The fourth appellant's petition of appeal *inter alia* reads as follows:

1. The learned trial Judge has erred in law and ruled that there was a *prima facie* case when the totality of the evidence adduced at the end of the prosecution's case did not establish the essential ingredients of the offence under Section 3(1) of the Kidnapping Act 1961 read together with Section 34 of the Penal Code.

2. The learned trial Judge had completely misconceived the law under Section 3(1) of the Kidnapping Act 1961 where the learned Judge clearly failed to appreciate adequately or at all the meaning of 'ransom' as defined by Section 2 of the Kidnapping Act 1961.

3. The learned trial Judge has also failed to direct her mind sufficiently or at all to the evidence of the prosecution's own witness PW37 (Chiew Yong Kiong) in her judgment.

4. The learned trial Judge had also directed herself on extortion of money from PW1 in the trial and at most it is constituted the offence of extortion and not kidnapping.

5. The learned trial Judge had erred in law and fact in which Her Ladyship had failed to appreciate and consider or at all the evidence of the complainant (PW1) and also the evidence of the other prosecution's witnesses.

Brief Facts

[8] The learned trial judge had written an 80 pages judgment setting out the facts and law inclusive of the defence of the appellants in detail. The learned Deputy Public Prosecutor had summarised the facts and much judicial time will be saved by not repeating the same. The said summary reads as follows:

4.1. On 17 July 2010 at around 9.00 am, Wong Tee Yong (PW1) was driving to her son's school to collect her son's report card when her Toyota Camry car (QRC 9449) was knocked from behind. She alighted from the car and saw a man coming out from the car behind (QAP 1927) that knocked against her car. The man introduced himself as Andrew (later identified as 3rd accused) told PW1 that he would compensate her for the damage of her car. He also told her that the other passengers in his car were his siblings.

4.2. The 3rd accused told PW1 that his cousin had a workshop and he could send her car there that same day for repair. After the 3rd accused's persuasion PW1 agreed to let Andrew's alleged sister and brother (later identified as 1st and 4th accused respectively) accompany her to the school to collect the son's report card and then send the car for repair. After collecting the son's report card, the 4th accused told PW1 the location of the workshop and while they were on the way to the workshop, the phone of the 4th accused rang. After talking on the phone, 4th accused told PW1 that he could help to send the car to the workshop after sending her home first. He then asked her to drive the car to a particular Petronas petrol kiosk.

4.3. When the car reached the Petronas petrol kiosk, PW1 saw that the 3rd accused was already there. The 3rd accused told PW1 to get into his car as he would send her home while the 1st accused would send PW1's car to the workshop. PW1 surrendered her car key to the 1st accused before getting into the 3rd accused's car.

4.4. Upon getting into the 3rd accused's car, PW1 noticed the presence of (3) men – 3rd accused (as driver) and 2 other men. Later the 4th accused also got into the car and sat beside PW1.

4.5. After driving a short distance, the 3rd accused suddenly snatched PW1's handbag that was on her lap while the front seat passenger pushed her head down. The two men sitting beside her grabbed her

hands, pulled them behind her back and tied them, they also gagged her mouth and tied her legs. They blind folded her and made her 'lie face down'.

4.6. The car continued to travel for some distance before PW1 heard the sound of an automatic gate open. She was then placed inside a gunny sack, lifted up and brought inside a house.

4.7. While inside the house, PW1 was placed face down on a mattress on the floor, the gunny sack was opened and the gag was removed. She was blindfolded. They proceeded to forcefully remove her ring, necklace and watch. When PW1 asked them why they brought her there, a person who sounded like the 3rd accused told her that his father was hospitalised and he needed RM250,000.00 to save his father's life.

4.8. PW1's three ATM cards and credit cards were taken away from her and PW1 was asked to tell them the pin number of the ATM, which she did. Thereafter she heard the sound of a motorcycle leaving the house. They made her sign a few signatures and then imitated her signature as she heard a man asking "Does it look similar?"

4.9. Meanwhile PW1 begged them not to hurt her and to allow her to call her relatives to fetch her younger daughter from school. They allowed her to make the call provided that she sounded normal and that she must not let them know that she had been kidnapped. They said if she did not follow what they said, they would fetch her daughter and rape her, and also kill her son. PW1 begged them not to do that and that she would do whatever they asked.

4.10. Thereafter, through the gap below the blindfold, PW1 could see that they took the SIM card out from her i-phone and put it into their phone. They then dialled the number given by PW1 and gave the phone to PW1 to talk to her relative, Anna, to request her to fetch her daughter from the school. They switched the phone to the speaker mode so that they could hear the conversation between PW1 and Anna.

4.11. Thereafter they made PW1 telephoned many of her relatives to ask them to bank money into either her bank account or the accounts given by them. Then they went to withdraw the money from various bank accounts with the ATM cards.

4.12. They also bought gold using PW1's credit card.

4.13. PW1 was subsequently released in the evening of the same day. The accused told her that they had left a black colour bag inside her car and instructed her to throw it into a drain. PW1 saw a Toshiba laptop that was left in her car and she threw it into a dustbin.

4.14. On the next day PW1 made a police report. An investigation ensued where on 21 July 2010 the 1st accused went to the Central Police Station, Sibu and was subsequently arrested.

4.15. On 22 July 2010, the police arrested 9 other persons including 2nd, 3rd and the 4th accused in a house at No. 5A Bruang Road, Sibu.

[9] All the counsel for the appellants agreed that the first appellant's counsel will lead and others will if necessary highlight issues relevant to their clients.

[10] Learned counsel for the first appellant summarises the complaint to four issues *inter alia* (i) the charge was unknown to the appellant; (ii) ransom not clearly made out; (iii) failure to convict for lesser charge of extortion; (iv) no common intention.

Charge Unknown To The Appellant

[11] On the first issue learned counsel for the first appellant summarises the submission as follows:

> 2.1. The 1st appellant has been wrongly convicted on a charge which was never preferred against her, in that:-
>
> (a) The original charge and the amended charge which the 1st appellant was asked to take the plea both specifying that the ransom sum to be RM250,000.00.
>
> (b) However, the charge that was considered by the learned Judge as appeared in her Grounds of Decision was from nowhere and it specified a ransom sum of RM53,400.00. Up till now, the 1st appellant does not know how does this figure of RM53,400.00 come about.
>
> (c) Hence, the charge stated in the Grounds of Decision of the learned Judge which the 1st appellant has now been convicted was never preferred against her and no plea was ever taken on the said charge thus rendering the trial a nullity and the resulting conviction of the 1st appellant a travesty of justice.
>
> (d) Furthermore, there is no iota of evidence led by the prosecution in the trial to show that the appellants did demand the said ransom sum of RM53,400.00 from PW1, the complainant. None of the prosecution's witnesses had testified to that effect.
>
> (e) The 1st appellant was prejudiced as she was ordered to enter defence on an unknown charge to her.
>
> (f) If the RM53,400.00 was based on the alleged amount received, then it is an offence of knowingly receiving ransom under section 5 of the Kidnapping Act 1961 which attracts only a lighter sentence of imprisonment not exceeding 10 years and shall also be liable to whipping.

[12] We do not find merit in the submission or the technicalities raised. The law does not require the exact sum asked or paid to be stated in the charge. The exact sum is not also an element of the offence. Section 2 of the Kidnapping Act 1961 defines ransom as:

> "ransom" means any money, price or consideration paid or demanded for the release of a person abducted or wrongfully confined or wrongfully restrained.

Section 3 states:

> 3. (1) Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping.

[13] In essence, once a person is abducted and ransom is asked for release, a charge under s. 3 is attracted. There are ample evidences to say s. 3 is applicable and it does not really matter what the learned trial judge had to say and that cannot be taken up as technical issues to obtain an acquittal unless it can be shown a miscarriage of justice has occurred in consequence of any error or omission of the trial judge. In addition, the apex court is obliged not to intervene when there are sufficient evidence to justify the charge pursuant to s. 60 of CJA 1964.

Ransom Clearly Not Made Out

[14] On the issue, learned counsel for the first appellant says there was no evidence that the money allegedly demanded was as consideration for the release of the complainant. This issue is related to the 'preliminaries' which we have stated earlier, and the money asked was for the purpose not to harm the victim's children.

[15] We find it difficult to comprehend this line of argument. Common sense will dictate if not for the ransom she will not be released. Conduct and motive under s. 8 of the Evidence Act 1950 will clearly bring nexus to the demand, consideration and the release of the victim. The conduct of the appellants on this issue is inextricably interwoven to anchor the charge as well as culpability. This is not a case where the ransom has no nexus to her release.

Failure To Convict For Lesser Charge Of Extortion

[16] On this issue, learned counsel summarised the submission as follows:

> 4.1. In determining whether an offence of Kidnapping or any other lesser offence had been committed, the learned Judge had made the following erroneous finding to show her disagreement that a lesser offence had been committed as contented by the 1st appellant:
>
> (a) It is not a case of Madam Wong being wrongfully confined, that is, being totally prevented or restrained from proceeding in any direction and then extorted.
>
> (b) It is not a case of Madam Wong being confined in the sense of being deprived of liberty – partial of total – to move in a particular direction. She was actually abducted by deceitful means.
>
> (c) The learned Judge failed to appreciate that her finding that Madam Wong was actually abducted by deceitful means was in the context under Section 362 of the Penal Code (offence for Abduction) and is applicable for the offence under Sections 364, 365, 366, 367, 368

A and 369 of the Penal Code. All of such sections referred to kidnapping under Section 359 of the Penal Code which has no relevance to the circumstances of the charge referred against the accused persons.

(d) The learned Judge failed to appreciate that the fact of the abduction even by the deceitful means do not *IPSO FACTO* constitute Kidnapping under Section 3(1) of the Kidnapping Act 1961.

(e) The ingredients of Abduction and Wrongful Confinement by themselves are insufficient to prove Kidnapping under Section 3(1) of the Kidnapping Act 1961 and they are only one ingredient of the offence.

(f) The learned Judge was also wrong by referring to Section 359 of the Indian Penal Code for the meaning of 'Kidnapping' having found that the Kidnapping Act 1961 does not define the word 'kidnap'.

(g) Section 359 of the Indian Penal Code refers to Kidnapping from India or from lawful guardianship which section is irrelevant to the circumstances of our case. [See *Ratanlal & Dhirajlal's The Indian Penal Code*, Section 359].

[17] We do not find any merit in this line of submissions. There is no duty and obligation for the trial judge to consider a lesser offence when the evidence is sufficient to attract s. 3 of Kidnapping Act 1961. This is not a case where the prosecution has offered an alternative charge. The obligation to consider a lesser charge will only be applicable if the prosecution had not established its case beyond reasonable doubt as per the charge but the learned trial judge takes the view that there are sufficient evidence to attract a lesser charge. The law does not permit the appellant to demand a lesser charge when the prosecution has established its case beyond reasonable doubt as per the charge.

No Common Intention

[18] On the issue of common intention, learned counsel says that the first appellant was not privy to the alleged abduction or that she was involved in any pre-arranged plan, etc. and learned counsel summarises the submission as follows:

5.2. There was a lack of judicial appreciation on the part of the learned Judge on the following evidence which would otherwise deny common intention on the part of the 1st appellant in the alleged kidnapping:

(a) The learned Judge had failed to appreciate the 1st appellant's evidence that she was also the victim of a crime who had been confined in the house subject to brutality and sexual abuse by the 3rd accused/3rd appellant which evidence was clearly supported by the Deputy Public Prosecutor during the cross-examination of the 3rd accused when it was put by the DPP to the 3rd accused/3rd appellant's allegation that the 1st appellant namely Ting Khai Sin was not abused physically and sexually by him was not true.

(b) The fact that the 1st appellant was abused physically by the 3rd accused/3rd appellant has also been corroborated by the evidence of the prosecution's own witness PW37 Chew Yong Kiong. The said PW37 testified that the 1st appellant was still very frightened the day when PW37 saw the complainant was taken to the house. There was no direction at all on this part of PW37's evidence by the learned Judge, thus there is a serious misdirection by way of nondirection which has occasioned a miscarriage of justice.

(c) The learned Judge had also failed to warn herself on the danger in accepting the bare allegation of the complainant (PW1) (by merely judging from the voice and hand-look as she was blindfolded at all material times) that it was the 1st appellant who was present in the room where the complainant was allegedly confined and that it was the 1st appellant who talked to the complainant, pressing the telephone numbers, texting and sending text messages in the room. There was no direction at all that the complainant was only making an assumption when she testified that it was the 1st appellant who spoke to her in the room as evidently the complainant could neither remember the voice of the said lady who spoke to her nor could she remember how the hand that pressed the telephone and text messages looked like during the trial. The complainant's evidence in this respect is so shaky and unreliable.

(d) The above evidence, if properly appreciated, would have shown that the 1st appellant was indeed a victim of a crime too and she was not a party to the concerted plan in the alleged kidnapping of PW1.

[19] It is trite for common intention to apply, pre-arranged plan is not necessity element. What is important in this case is that the first appellant has nexus and participated in the conduct of the other appellants during the relevant period of the crime to attract criminal liability. The evidence does not exonerate the first appellant at all from the crime. In *Ravindran Ramasamy v. PP* [2013] 8 CLJ 834; [2013] 4 MLJ 665 on common intention, the Court of Appeal through Hamid Sultan bin Abu Backer JCA had this to say:

[i] What is important to note, under section 3A FIPA 1971 and section 34 of the Penal Code which deals with common intention is that one need not be the principal offender to be liable for the offence. Association in the crime and failing to show satisfactory dis-association from the crime or principal offender will attract the charge as well as the sentence as per decided cases in this area of jurisprudence.

[ii] It is well settled that for the prosecution to succeed in relation to a charge under section 3A of the FIPA 1971 it has to establish 5 essential elements of the offence, namely:

(i) The said scheduled offence was committed;

(ii) The accused was an accomplice;

(iii) The accused was present at the scene of the robbery;

(iv) The firearm was discharged within the meaning of section 2 of FIPA 1971;

(v) **The accused may reasonably be presumed** to have known that the person who discharged the firearm was carrying the same (emphasis added). The burden to disprove is one on the balance of probabilities as imposed by section 3A FIPA 1971.

[iii] In *PP v. Choo Chuan Wang* Edgar Joseph JR J (as he then was) had this to say:

> Thus, the onus is passed to the accused to prove, on the **balance of probabilities** that he had taken all reasonable steps to prevent the discharge of the firearm concerned. (emphasis is ours). However, the accused's bare denial that he was a party to the robbery and his conduct at the scene of the crime could not possibly discharge the onus which lay upon him.

[iv] Having said that, it must be noted that section 34 does not provide such a high burden on the accused. However, there must be some evidence at the trial either at prosecution stage or defence stage to show that the accused at the time of the incident had dis-associated from the criminal act to be relieved from section 34. For example, if several persons have joined hands to assault a person by hand and suddenly one of the accomplice takes a knife to assault, any accomplice who attempts to stop the other from using the knife or moves away from the incident will not be charged for murder or culpable homicide in the event the knife was used to kill the victim. The only offence at all the accomplice may face is for assault. [See *Joginder Ahir v. State* AIR 1971 SC 1834].

[v] The difference between section 3A FIPA 1971 and section 34 *inter alia* is that the threshold burden for the prosecution to establish the case is low and the burden to disprove the case for the accused is on the balance of probabilities (high threshold). However, when section 34 is relied on the threshold burden is high for the prosecution and burden on the defence is low, i.e. need not disprove on the balance of probabilities, and it will be sufficient if the defence cast a reasonable doubt. Further, the existence of a common intention among the participants in a crime is the essential element for the application of section 34 and in the absence of such common intention, the section has no application. [see *Ashok Kumar v. State of Punjab* AIR 1977 SC 109]. It is also well settled in relation to section 34 that at times it is difficult if not impossible to procure direct evidence to prove the intention of an individual. In most cases it has to be inferred from his act or conduct or other relevant circumstances of the case. [see *Suresh v. State* U.P. (2001) SCC]. On similar note the position under section 3A FIPA 1971 is not only the same but the threshold for the prosecution to satisfy this requirement is placed much lower than section 34.

[vi] Mere denial of knowledge would not *per se* be sufficient to satisfy the burden placed under section 3A FIPA 1971. Mere denial also will not be sufficient to relieve the accused of the elements of section 34 of the Penal Code.

[20] We have also considered the written submissions of the other learned counsel in detail and we find no merit.

[21] All learned counsel heavily relied on the case of *PP v. Ini Abong & Ors* [2009] 1 CLJ 526; [2008] 1 LNS 526. That part of their submission by the fourth appellant reads as follows:

(c) In the case of *PP v. Ini Abong & Ors* [2008] 1 LNS 526, His Lordship Dr. Hamid Sultan Abu Backer (as he then was) has explained extensively the definition of ransom which is now reproduced as below:

> any sum or consideration without consideration.

His Lordship went on to hold that:-

> the section used the word money, and also consideration. Established dictionaries also support my proposition and the payment is said for the release i.e. the consideration is for the release and not otherwise to constitute ransom.

It is patently clear that to constitute 'ransom', it must be for the release of the body of the complainant.

[22] In the instant case, it cannot be denied that the ransom has nexus to the release of the victim. If it has no nexus it will not attract s. 3 of KA 1961.

[23] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed Radhi's direction and rightly applied the maximum evaluation and beyond reasonable doubt test. [see *PP v. Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v. PP* [2013] 4 CLJ 470; [2013] 4 MLJ 888; *Chin Kek Shen v. PP* [2013] 7 CLJ 435; [2013] 5 MLJ 827].

[24] In conclusion we find the appeals have no merit. The appeals are dismissed and we affirm the decision of the High Court.